Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

GULF PARK WATER COMPANY, INC.,

Petitioner,

versus

MISSISSIPPI PUBLIC SERVICE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The Mississippi Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether an Order of the Mississippi Public Service Commission, upheld by the Mississippi Supreme Court, (i) which found Petitioner, a privately owned public utility, to be in technical noncompliance with an Order of that agency issued ten (10) years previously and (ii) which directed Petitioner to cease collecting a rate increase awarded to Petitioner in the earlier Order for the cost of complying therewith and to refund to customers all such amounts collected over the previous ten (10) years, with interest, resulted from unreasonable, arbitrary or capricious action by the Mississippi Public Service Commission and thereby deprived Petitioner of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution?

(2) Whether an Order of the Mississippi Public Service Commission, upheld by the Mississippi Supreme Court, (i) which found Petitioner, a privately owned public utility, to be in technical noncompliance with an Order of that agency issued ten (10) years previously; (ii) which directed Petitioner to cease collecting a rate increase awarded to Petitioner in the earlier Order for the cost of complying therewith and to refund all such amounts collected over the previous ten (10) years, with interest; and (iii) which refused to recognize the capital investments made by Petitioner pursuant to the earlier Order to improve its quality of service and to award Petitioner a just and reasonable rate therefore constituted a taking of Petitioner's property without paying just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the court whose judgment is sought to be reviewed are named in the caption of this case.

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Petitioner informs this Court that its parent company is Johnson Utilities, Inc.

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINION BELOW

On October 19, 1993, the Mississippi Public Service Commission ("MPSC"), sua sponte directed the opening of an inquiry into, *inter alia*, whether Gulf Park Water Company, Inc. ("Gulf Park") had complied with an Order of the MPSC dated May 30, 1984. The May 30, 1984 Order directed Gulf Park to install a 200 GPM (gallons per minute) well in its certificated area in Jackson County, Mississippi, within forty-five (45) days of issuance of the Order and authorized Gulf Park to increase its monthly rates by $1.47 per month per customer to allow Gulf Park to recoup the cost of complying with the Order.

A hearing before the MPSC on its complaint commenced on December 15, 1993 and concluded on December 16, 1993. In opening remarks, Gulf Park questioned the constitutionality of the MPSC's actions. (V R. 26) At the conclusion of the hearing, and despite overwhelming evidence that Gulf Park had complied with the intent of the May 30, 1984 Order, the MPSC rendered oral findings that Gulf Park was in violation of the Order for failing to install a 200 GPM well and for collecting the rate increase approved in the Order without having installed the well.[1]

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[1] See Oral Findings of Mississippi Public Service Commission annexed hereto at Appendix pp. App. 5 through App. 9.

Further, the MPSC ordered Gulf Park to cease and desist collections of the $1.47 rate increase and to refund, with interest, all such amounts collected since issuance of the May 30, 1984 Order. The MPSC issued its written Order conforming to its earlier oral findings on March 24, 1994.[2]

Gulf Park appealed the March 24, 1994 Order to the Circuit Court for the First Judicial District of Hinds County, Mississippi. Thereafter, on Gulf Park's motion, the appeal was transferred to the Chancery Court of Jackson County, Mississippi. In both its original and rebuttal briefs filed in the Chancery Court, Gulf Park challenged the March 24, 1994 Order on due process grounds, while also intimating in its rebuttal brief the basis for a takings claim. (II R. 163, 185) The Chancery Court took up the appeal on February 12, 1996, on the parties' briefs and affirmed the MPSC Order, concluding the Order "does not contain any errors of law, is supported by substantial evidence, is not contrary to the manifest weight of the evidence, is not in excess of statutory authority or jurisdiction of the Commission, and does not violate any constitutional rights."[3] (II R. 189)

Gulf Park filed its Notice of Appeal with the Supreme Court of Mississippi on March 12, 1996. Considering the matter solely upon the parties' briefs, the Supreme Court upheld the March 24, 1994 Order, finding substantial evidence to support the MPSC's decision. Although Gulf

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[2] See Order of the Mississippi Public Service Commission annexed hereto at Appendix pp. App. 10 through App. 14.

[3] See Order of the Chancery Court of Jackson County, Mississippi, annexed hereto at Appendix pp. App. 15 through App. 16.

Park reiterated its constitutional challenges to the March 24, 1994 Order in its original and rebuttal briefs in the Supreme Court, the Supreme Court failed to address these claims. The Supreme Court memorialized its ruling in a four-page unpublished opinion rendered on September 11, 1997.[4] Gulf Park petitioned for rehearing on October 27, 1997, and the Supreme Court denied the petition on December 8, 1997.[5]

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction to review the decision entered by the Mississippi Supreme Court under 28 U.S.C. § 1257(a), which effectuates this Court's appellate jurisdiction granted by U.S. Const. Art. III, Section 2, cls. 1 and 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The pertinent constitutional provisions involved in this case are:

(1). U.S. Const. Amend. 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury,

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[4] See Unpublished Opinion of the Mississippi Supreme Court annexed hereto at Appendix pp. App. 1 through App. 4.

[5] See Mandate from the Mississippi Supreme Court annexed hereto at Appendix p. App. 17.

except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ***nor shall private property be taken for public use, without just compensation.***" (Emphasis added).

(2). U.S. Const. Amend. 14, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ***nor shall any State deprive any person of life, liberty, or property, without due process of law***; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added).

The pertinent statute involved in this case is:

(1). Miss. Code (1972) Ann. § 77-3-33(1):

"No rate made, deposit or service charge demanded or received by any public utility shall exceed that which is just and reasonable. Such public utility, the rates of which are subject to regulation under the provisions of this article, may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person. Rates prescribed by the commission shall be such as to yield a fair rate of return to the utility furnishing service, upon the reasonable value of the

property of the utility used or useful in furnishing service."

STATEMENT OF THE CASE

Gulf Park is a privately owned public utility providing water and sewer service to approximately 1,200 homes within a certain certificated area in Jackson County, Mississippi, commonly referred to as Gulf Park Estates. Gulf Park was acquired by Johnson Utility Company, Inc. in 1980 at a time when both the water and sewer systems were in deplorable condition and/or were non-functioning. (VI R. 230) In 1983, Gulf Park was ordered by the Jackson County Chancery Court to proceed with a rate filing before the MPSC to secure the funds necessary to rectify the problems associated with its sewer system. (Exh. 13) Gulf Park proceeded in correcting the aspects of the sewer system so that it was functioning properly. With regard to the water system the system experienced low water pressure and was otherwise in need of repairs. Gulf Park proceeded to rectify the water system as described below.

In association with Gulf Park's rate filing, the Commission ordered Gulf Park on March 15, 1984, to retain a registered professional engineer, Mr. Joe Brown, to analyze this system to see what improvements were needed to bring the system into compliance with Mississippi Health Department standards. (Exh. 6) Mr. Brown issued an engineering report dated April 25, 1984. (Exh. 8) This engineering report pointed out, among other

things, that the Gulf Park system needed additional well capacity to properly serve its customers.

In the course of Gulf Park filing its Petition for rate relief with the MPSC, Gulf Park simultaneously attempted to address the concerns of its customers by taking steps to improve its water distribution system. First, Gulf Park had the primary wells serving the system, referred to as the Marina well and Barnacle well, reworked to increase their capacities from approximately 150 GPM each to 400 GPM each. (VI R. 231)

The engineering report prepared by Joe Brown indicated that an increase in water was needed throughout Gulf Park's entire water system. Due to the fact that Gulf Park's trunk lines were only two inches (2") in size, a large well in any one particular place would be of no avail. This fact was verified through numerous witnesses brought before the MPSC in the December, 1993, hearing.

A hearing was held before the MPSC on May 30, 1984. Shortly thereafter, an Order was rendered by the MPSC which, *inter alia*, ordered Gulf Park to install a 200 GPM well as part of its system and to collect an additional $1.47 per month per customer for this expenditure. (Exh. 2)

In an effort to comply with the May 30, 1984 Order, Gulf Park proceeded in the most sound manner from an engineering standpoint, to wit: It placed on line two wells which had been previously abandoned, and installed a 70 GPM well at a new location. (VI R. 233) The combination of these events increased Gulf Park's flow to well over that required by the Mississippi Health Department and

the 200 GPM requirement outlined in the MPSC's May 30, 1984 Order.

No action was taken or questions raised concerning the work performed by Gulf Park pursuant to the May 30, 1984 Order for almost ten (10) years. It was not until newly elected Commissioner Curt Hebert, on his own motion, instituted an inquiry in 1993 that there was any question concerning Gulf Park's compliance with the May 30, 1984 Order.

A two-day hearing was held in the Jackson County Courthouse with Commissioners Curt Hebert and Bo Robinson presiding. The first witness called by the MPSC was Mr. Gary Huff, the Public Utilities Staff's ("Staff") chief engineer. Mr. Huff testified that he had inspected the system and that Gulf Park had not installed a 200 GPM well to its system. (V R. 56) On cross examination, Gulf Park attempted to offer into evidence the March 15, 1984 Order of the MPSC which directed Gulf Park to retain an engineer to analyze the system, a memorandum of the MPSC engineer, J.L. Paulk, and the engineering study prepared by Gulf Park's engineer. These documents were offered to show on cross examination that the installation of a 200 GPM well on Gulf Park's two inch (2") distribution lines would be ludicrous from an engineering perspective. The MPSC, however, refused to allow these documents into evidence.[6] (V R. 87) Further on in cross examination, Mr. Huff conceded that a 200 GPM

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[6] These documents were later admitted into evidence when the Commission attempted to use them. (V R. 255 & 273)

well would provide no more flow than a 70 GPM well using two inch (2") distribution lines. (V R. 102)

The next witness called by the MPSC was Mr. Ron Brewer, the Staff senior accountant. Mr. Brewer's testimony centered primarily around issues not germane to this petition. Mr. Brewer performed calculations to determine how much additional revenue Gulf Park had purportedly collected from its customers since June, 1984, due to the $1.47 per month additional charge as approved by the MPSC's May 30, 1984 Order. Mr. Brewer calculated the amount to be $126,958. (V R. 120) Further in Mr. Brewer's testimony, he was provided Gulf Park's annual reports on file with the MPSC from 1984 through 1993. These documents showed that Gulf Park had consistently incurred annual losses from its water and sewer operations during this entire period. (Exh. 10)

After the MPSC called Mr. Huff and Mr. Brewer as its only witnesses, it rested its case. Gulf Park renewed its Motion to Dismiss which was denied. (V R. 142)

In its defense, Gulf Park called as its first witness Mr. Terry Moran, a registered professional engineer. Mr. Moran stated that he had been retained by Gulf Park back in 1990 to perform a hydraulics study to see what improvements were needed to Gulf Park's water system. (VI R. 145) In doing this study, Mr. Moran noted that many of the distribution lines were small two (2") lines and that the lines were not looped correctly when the system was put in place. (VI R. 148) Mr. Moran stated that a large capacity well, such as a 200 GPM well, would be of no use utilizing two inch (2") distribution lines. (*Id.*)

At this point in the hearing, Gulf Park moved the MPSC to amend the May 30, 1984 Order to make it speak true, in that the intent of the Order was to increase Gulf Park's flow system-wide by 200 gallons per minute in a way that could be accommodated with two inch (2") distribution lines. (VI R. 149)

In support of its Motion to Amend, Gulf Park called Mr. Lynn Havens, former Public Service Commission Commissioner for the Southern District, which includes Gulf Park Estates. Mr. Havens served as a Public Service Commission Commissioner from 1980-1988. In such capacity, Mr. Havens employed several investigators under his direction to assist him in overseeing utility companies. (VI R. 152) The particular investigator he assigned to the Gulf Park matter was Mr. A.W. "Buzzy" Lang. (*Id.*) Mr. Havens testified that Mr. Lang reported back to him often, sometimes daily, concerning the developments at Gulf Park. (*Id.*)

In an effort to lay a predicate or background to the facts giving rise to the MPSC's May 30, 1984 Order, Gulf Park attempted to offer into evidence an Order of the Jackson County Chancellor, which directed Gulf Park to proceed through the MPSC for approval to improve its water and sewer systems. This led to the March 15, 1984 Order of the MPSC directing Gulf Park to retain an engineer to study the system. (Exh. 6) The result of this study was the April 25, 1984 engineering report by Joe Brown where he specifically recommends a 50-75 GPM well in a certain area. In his report, Mr. Brown specifically states that a larger well would require new water mains to resolve the low pressure in the problem areas. (See unnumbered page 9 of Exh. 6) This engineering report

was common knowledge with the Commissioners and their Staff. In fact, the MPSC's chief engineer, J.L. Paulk, was expressly advised by Gulf Park of its progress in drilling a new well and bringing others on line. (Exh. 9) Mr. Havens was kept fully abreast of all of the above described developments which were accepted by him as in full compliance with the May 30, 1984 Order. (VI R. 159) All of this evidence was proffered by Gulf Park after same was denied into evidence.[7]

Mr. Havens further testified he was aware that Gulf Park had not met the specific directives of installing a 200 GPM well, but in speaking with the MPSC Engineer, J.L. Paulk, he was more concerned with 200 gallons of additional flow. (VI R. 164) Mr. Havens further testified that he was aware that Gulf Park had reworked four (4) wells and installed a 70 GPM well in order to alleviate the low pressure problems, (VI R. 166) and that these steps met his approval. (VI R. 168) These steps met his approval because he was aware that what he had set forth in the May 30, 1984 Order was not a workable solution. (*Id.*) Mr. Havens further testified that his assistant, Mr. Lang, was fully advised of what improvements Gulf Park was making and Gulf Park reported their work to Commissioner Havens through Mr. Lang. To summarize his opinion, Mr. Havens stated:

> The purpose of the Order generally, not to the exact letter of the law as the Order stated, was

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[7] The engineering study prepared by Mr. Joe Brown was later admitted into evidence when the Commission attempted to use same. (RE 33-44; VI R. 255)

> to correct the problem at Gulf Park. When it was full knowledge to me that the 200 gallon per minute well could not be – would not correct the problem in the east end of Gulf Park but a smaller well in a specific location with the two inch (2") mains could correct the pressure problem, then it never crossed my mind to have a delay to get a Commission together to issue a docket call for another Order and giving them the authority to drill the 70 gallon per minute well but instead going full steam ahead of correcting the problem. Which I had at that time several dozen people that was almost completely without water. (VI R. 171)

Mr. Havens further stated that if anyone would have suggested the action taken by Gulf Park was not in technical compliance with the May 30, 1984 Order, he would have advised them to amend the Order to reflect that Gulf Park had met the additional 200 gallons per minute. (VI R. 174) Lastly, Mr. Havens testified that problems within a particular district were the responsibility of that particular Commissioner and, in Mr. Havens' opinion, a Commissioner has the obligation to solve those problems in his district.

Gulf Park next called Mr. A.W. "Buzzy" Lang, the administrative assistant to then Commissioner Havens. Mr. Lang verified that he reported to Commissioner Havens daily or weekly on the progress at Gulf Park and that he specifically advised Mr. Havens that Gulf Park had drilled a 70 GPM well in lieu of a 200 GPM well because the latter was not practical. (VI R. 186) Further, Mr. Lang was of the opinion that Gulf Park's actions were

in substantial compliance with the MPSC's May 30, 1984 Order. (*Id.*)

Mr. Glenn K. Johnson, a principal of Gulf Park, was next called to the stand. Mr. Johnson stated that the construction period in making various improvements to Gulf Park's water system lasted approximately four (4) months and that various employees of the MPSC were inspecting the progress during the entire period. (VI R. 190) Mr. Johnson testified that several MPSC personnel advised him that the improvements implemented by Gulf Park were in substantial compliance with the May 30, 1984 Order. (VI R. 192)

At the conclusion of Mr. Johnson's testimony, Gulf Park rested on its Motion to Amend. The MPSC reserved ruling on the Motion, and Gulf Park proceeded with its defense to the case-in-chief.

Mr. Terry Moran then testified that a 200 GPM well would do little good in serving two inch (2") distribution lines. (VI R. 215) Mr. Moran agreed wholeheartedly with the approach taken by Gulf Park back in 1984 as the proper solution to the water system's problems at that time. (*Id.*)

Mr. Johnson was again called to the stand. Mr. Johnson testified that to improve service, Gulf Park drilled a 70 GPM well and put two (2) other wells back on line that had been placed out of service. (VI R. 233) Reworking these two (2) wells and drilling the new well increased total flow by 215 gallons per minute. (VI R. 234) Mr. Johnson further testified that more money was spent making these improvements than had Gulf Park just installed a 200 GPM well. (VI R. 235) Mr. Johnson further

testified that he followed the authority of Mr. Havens and his chief investigator, Mr. Lang, in deciding what he was being asked to do by the MPSC. (VI R. 236)

To verify that the MPSC was satisfied with the work performed by Gulf Park, a memorandum dated July 2, 1984 from J.L. Paulk to Commissioner Havens advising him of a recent inspection of the system was placed into evidence. (VI R. 252 and Exh. 15) On cross examination, Mr. Johnson was questioned as to how he could argue that the reworking of Gulf Park's two main wells (i.e., Barnacle and Marina) could be considered as part of compliance with the May 30, 1984 Order when they were reworked at the time the engineer's report was prepared in April, 1984. (VI R. 258) This cross, however, failed to recognize that Gulf Park reworked two other wells *after* the MPSC's Order which satisfied the 200 GPM requirement. (VI R. 166; VI R. 233)

In rebuttal to Gulf Park's defense, the MPSC called Mr. George Fleming. Mr. Fleming served as the attorney for the MPSC during the period in question (i.e., 1983-1984) and now serves as the attorney for the Mississippi Public Utilities Staff. Mr. Fleming testified that he drafted the May, 30, 1984 Order in question. (VII R. 289) Mr. Fleming testified that he specifically remembered Commissioner Havens instructing him to put that language in the Order regarding the 200 GPM well requirement. (VII R. 291) On cross, Mr. Fleming admitted that if it had been brought to his attention by anyone in the Staff that there was a violation of a MPSC Order, he would have informed the Commissioners of it. (VII R. 299) Furthermore, Mr. Fleming stated that no one, including the MPSC's engineer, Mr. J.L. Paulk, brought to his attention

that Gulf Park had violated the May 30, 1984 Order. (VII R. 300)

Mr. Fleming also conceded that an inquiry was made back in 1990 at the request of then Commissioner George Watson into Gulf Park's compliance with the May 30, 1984 Order, and no action was taken by the MPSC against Gulf Park. (VII R. 301)

The final witness brought by the MPSC in rebuttal was Mr. J.L. Paulk, former chief engineer for the MPSC for the period in question. Mr. Paulk testified that he did not approve the work performed by Gulf Park in lieu of installing a 200 GPM well. (VII R. 323) Mr. Paulk also testified that this fact was reported to responsible people on the Staff and it was generally known by Commissioner Havens shortly after the Order was issued. (VII R. 330-331) Mr. Paulk stated that he informed Mr. Havens' administrative assistant, Mr. Bill Summers, who replied that Mr. Johnson informed him that drilling the one 70 GPM well and rehabilitating two other wells constituted compliance with the Order. (VII R. 333)

Mr. Paulk stated that his recollection of his engineering findings back at that time was that Gulf Park needed 200 gallons per minute of additional "pumping capacity" on the east side and did not recommend a 200 GPM well. (VII R. 334) Mr. Paulk further admitted that if water flowed into the system from whatever source to arrive at 200 gallons per minute of additional flow, then his recommendations would have been complied with. (VII R. 335) Finally, Mr. Paulk admitted that to make a 200 GPM well work in Gulf Park would require larger trunk lines. (VII R. 338)

Gulf Park and the MPSC rested, and Commissioners Hebert and Robinson shortly ruled from the bench denying Gulf Park's Motion to Amend and holding Gulf Park in violation of the May 30, 1984 Order. (VII R. 356) The MPSC then Ordered Gulf Park to stop collecting the $1.47 per month attributed to the well requirement and to refund all such rates collected from its customers since 1984, with interest.

LAW AND ARGUMENT

This case presents this Court with an important question of federal constitutional law, which has been decided by the Mississippi Supreme Court in a way that conflicts with relevant decisions of this Court. Specifically, this Court is asked to determine whether the Mississippi Supreme Court, by upholding the March 24, 1994 Order of the Mississippi Public Service Commission ("MPSC") has deprived Petitioner of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and has taken Petitioner's property without just compensation in violation of the Fifth Amendment to the United States Constitution. The March 24, 1994 Order (i) directed Petitioner to cease and desist collecting an approved rate increase and to refund, with interest, the amount of said rate increase collected by Petitioner without objection for over ten (10) years prior thereto; (ii) refused to recognize capital expenditures made by Petitioner pursuant to an earlier Order of the MPSC to improve the quality of service of Petitioner's water utility; and (iii) refused to grant Petitioner a rate

increase that would afford Petitioner a reasonable and just rate of return on those expenditures.

A. The Due Process Clause

The Due Process Clause of the Fourteenth Amendment requires that actions by a state through any of its agencies must be consistent with fundamental principles of liberty and justice. *Hebert v. Louisiana*, 272 U.S. 312, 47 S.Ct. 103, 71 L.Ed. 270 (1926); *Buchalter v. New York*, 319 U.S. 427, 63 S.Ct. 1129, 87 L.Ed. 1492 (1943). In this regard, an agency action deprives one of property without due process of law if such action is " 'arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . . ' " *Pennell v. City of San Jose*, 485 U.S. 1, 11, 108 S.Ct. 849, 99 L.Ed.2d 1, 14 (1988) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968) (quoting *Nebbia v. New York*, 291 U.S. 502, 539, 54 S.Ct. 505, 78 L.Ed.2d 940 (1934))). The action will stand, however, if a rational relationship exists between it and a legitimate governmental objective. *Nebbia*, 291 U.S. at 537, 54 S.Ct. at 516.

It is beyond dispute that the MPSC may legitimately regulate the price of a staple such as water if it thinks that the public interest and welfare so requires. See *FCC v. Florida Power Corp.*, 480 U.S. 245, 253, 107 S.Ct. 1107, 1113, 94 L.Ed.2d 282 (1987); *Permian Basin Area Rate Cases*, 390 U.S. at 768, 88 S.Ct. at 1360 ("A legislative power to create price ceilings has, 'in countries where the common law prevails,' been 'customary from time immemorial. . . . ' "). For due process purposes, then, the March 24, 1994 Order

of the MPSC must be examined in light of all the relevant surrounding circumstances, asking if any reasonable set of facts could establish a rational relationship between the Order and the MPSC's legitimate end of protecting the general welfare of the public. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *United States v. Carolene Products*, 304 U.S. 144, 154, 58 S.Ct. 778, 784-785, 82 L.Ed. 1234 (1938).

As this Court recognized in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 304-305, 57 S.Ct. 724, 730, 81 L.Ed. 1093 (1937),

> Regulatory commissions have been vested with broad powers within the sphere of duty assigned them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed.

(Citations omitted). Nonetheless, when an administrative agency casts aside those constitutional restraints assured every citizen by the Fourteenth Amendment as a minimal protection against the unreasonable, arbitrary or capricious exercise of power bestowed so freely, such actions cannot withstand judicial scrutiny. See *Ohio Bell Telephone Co.*, 301 U.S. at 302-304, 57 S.Ct. at 729-730.

Despite the overwhelming evidence that Gulf Park more than adequately complied with the spirit and intent of the May 30, 1984 Order, that Gulf Park's efforts in so

complying were supervised and approved by MPSC personnel, that the work done and the improvements made by Gulf Park accomplished the MPSC's ultimate objective of improving service to the ratepaying public, and that Gulf Park's compliance had not been challenged for over ten (10) years, the MPSC wielded its regulatory power with reckless abandon to punish Gulf Park. The MPSC shielded itself with the pretextual logic that Gulf Park was not in technical compliance with the exact wording of the May 30, 1984 Order. In short, the MPSC elevated form over substance for the sole purpose of exacting retribution from Gulf Park. At no time did the MPSC intimate that its actions would advance the welfare of ratepayers. In fact, at no time did the MPSC suggest any purpose for its action. Gulf Park had achieved the legitimate end sought to be attained by the May 30, 1984 Order, and the MPSC's March 24, 1994 Order inexplicably served only to penalize Gulf Park for its efforts.

That a public utility is entitled to such rates as will permit it to earn a fair return upon the value of the property it employs in service of the public is well-settled. See *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 31, 46 S.Ct. 363, *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 690, 43 S.Ct. 675, 678, 67 L.Ed. 1176 (1923) (and cases cited therein). "What annual rate will constitute just compensation depends upon many circumstances, and must be determined by the exercise of fair and enlightened judgment, having regard to all relevant facts." *Id.* at 692, 43 S.Ct. at 679. As has been demonstrated, in issuing the March 24, 1994 Order, the MPSC refused to recognize that Gulf Park had made

significant expenditures for capital improvements, thereby bringing its water system into compliance with the spirit and intent of the May 30, 1984 Order.

The MPSC's March 24, 1994 Order was an unreasonable, arbitrary and capricious act. It was unwarranted by any rational means. By stripping Gulf Park of the right to collect the previously approved rate increase, the MPSC quashed Gulf Park's ability to earn any return on its investment. Moreover, by ordering Gulf Park to refund, with interest, all rate increases collected since issuance of the May 30, 1984 Order, the MPSC imposed upon Gulf Park the sentence of a negative return on its expenditures. If a private utility employing its property for use by the public is deprived of the power to charge reasonable rates for the use of its property, and such deprivation takes place in the absence of fair, just and reasonable judicial investigation, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States. See, *e.g.*, *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 79, 81-82, 55 S.Ct. 324, 325, 79 L.Ed. 773 (1935); *Bluefield Waterworks & Improvement Co.*, 262 U.S. 23, 43 S.Ct. 675, 67 L.Ed. 1176. The adoption by the MPSC of technical compliance with the May 30, 1984 Order, without regard to overwhelming evidence of the futility of such compliance, as the standard imposed upon Gulf Park was "an arbitrary restriction in contravention of the Fourteenth Amendment and of 'the rudiments of fair play' made necessary thereby." *West Ohio Gas Co.*, 294 U.S. at 81, 55 S.Ct. at 325.

B. The Takings Clause

Gulf Park further submits that the MPSC Order of March 24, 1994 has effected a taking of its property without just compensation in violation of the Fifth Amendment to the United States Constitution. Indeed, recently, the constitutional requirement that rates be just and reasonable has moved into the domain of the Takings Clause.[8] See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). A state regulation that interferes too greatly with an owner's economic use of property has come to be viewed as a taking that requires the state to furnish just compensation. See, *e.g.*, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

As this Court noted in *Barasch*,

> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. Covington & Lexington Turnpike Road Co. v. Sandford 164 US 578, 597, 41 L Ed 560, 17 S Ct 198 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so

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[8] This does not mean that the Due Process Clause has lost all significance in this context. Instead, as previously discussed, the due process focus is less on the economic adequacy of the permitted rates, and more on whether the procedures for arriving at those rates are arbitrary, discriminatory or irrelevant to a legitimate legislative purpose.

> doing "practically deprive[s] the owner of property without due process of law"); FPC v. Natural Gas Pipeline Co. 315 US 575, 585, 86 L Ed 1037, 62 S Ct 736 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); FPC v. Texaco, Inc. 417 US 380, 391-392, 41 L Ed 2d 141, 94 S Ct 2315 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level"). If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.

488 U.S. at 307-308, 102 L.Ed.2d at 657. Thus, the March 24, 1994 Order confiscated Gulf Park's property in violation of the Takings Clause if the Order subjected Gulf Park to regulatory action which depressed the prices it may charge its customers below just and reasonable levels, and did so in the absence of an adequate state law remedy to secure to it just compensation for the "taking" which such action would impose. See *Barasch*, 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646; *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194, 105 S.Ct. 3108, 3120, 87 L.Ed.2d 126 (1985) (holding that Takings Clause requires government to provide a reasonable, certain and adequate procedure for obtaining compensation).

The only state law remedy available to Gulf Park to recover the capital invested in the improvements it did make pursuant to the May 30, 1984 Order was a rate increase from the MPSC. The MPSC recognized as much

in 1984, allowing Gulf Park a rate increase as part of the May 30, 1984 Order. However, the MPSC called this rate increase into question in the proceedings leading up to the March 24, 1994 Order. In response, Gulf Park sought relief from the MPSC by petitioning it to amend the May 30, 1984 Order to excise therefrom the specific requirement for a 200 GPM well and to insert language true to the intent of the Order – i.e., requiring Gulf Park to increase the system-wide flow rate by 200 GPM. Such an amendment would have alleviated Gulf Park's technical noncompliance and forced the MPSC to acknowledge and compensate Gulf Park for the expenditures outlayed pursuant to the May 30, 1984 Order. The MPSC denied Gulf Park's motion and, thereby, eliminated any state law avenue to recoup its investment.

Gulf Park also must demonstrate that the MPSC's March 24, 1994 Order depressed its rates below just and reasonable levels to substantiate its takings claim. Mississippi Code (1972) Annotated § 77-3-33(1) provides: "Rates prescribed by the commission shall be such as to yield a fair rate of return to the utility furnishing service, upon the reasonable value of the property of the utility used or useful in furnishing service." Although Mississippi jurisprudence has not adopted any definite formula for determining the reasonableness of public utility rates, the statutory requirement of just and reasonable rates is satisfied when the rates are cost-based. *State ex rel. Pittman v. Mississippi Public Service Commission*, 538 So.2d 387 (Miss. 1989).

In *Barasch*, this Court confirmed the "prudent investment" or "historical cost" approach as a constitutionally

acceptable method of fixing utility rates.[9] 488 U.S. at 309; 102 L.Ed.2d at 658. Under this approach, "the utility is compensated for all prudent investments at their actual cost when made (their 'historical' cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight." *Id.* The justification for this approach is "that what was 'taken' by public utility regulation is not specific physical assets that are to be individually valued, but the capital prudently devoted to the public utility enterprise by the utilities' owners." *Id.* (citing *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 291, 43 S.Ct. 544, 67 L.Ed. 981 (1923) (Brandies, J.)).

In this case, the MPSC has failed to abide by Mississippi law or federal constitutional law in adjusting Gulf Park's rates. The MPSC specifically refused to recognize that Gulf Park made substantial improvements to its water system in 1984 at expense in excess of that forecast for technical compliance with the May 30, 1984 Order. Moreover, the MPSC has not only precluded Gulf Park from collecting any further rates attributable to the work ordered in 1984, but has mandated that Gulf Park disgorge itself of all amounts collected to date in connection therewith, plus interest. The ultimate effect of the MPSC's March 24, 1994 Order is to retract from Gulf Park any return on its investment pursuant to the May 30, 1984

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[9] The *Barasch* Court did not condone the prudent investment/historical cost approach as the only constitutionally acceptable method of fixing utility rates. Instead, the Court's emphasis was that the consequences a governmental authority produces rather than the technique it employs is of constitutional importance.

Order and, in fact, to impose on Gulf Park a negative return on that investment in the form of uncompensated costs.

Regulated rates must be "just and reasonable" to be constitutional. *Barasch*, 488 U.S. at 307-308, 102 L.Ed.2d at 657; *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S.Ct. 736, 743, 86 L.Ed. 1037 (1942). To be just and reasonable, rates must provide not only for a company's costs, but also for a fair return on investment. *Barasch*, 488 U.S. at 307-308, 102 L.Ed.2d at 657; *Permian Basin Area Rate Cases*, 390 U.S. 747, 792, 88 S.Ct. 1344, 1373, 20 L.Ed.2d 312 (1968). Rates which fall below this standard are "confiscatory" and violative of the Fifth Amendment to the United States Constitution. *Barasch*, 488 U.S. at 307-308, 102 L.Ed.2d at 657; *FPC v. Natural Gas Pipeline Co.*, 315 U.S. at 585, 62 S.Ct. at 742. The MPSC's March 24, 1994 Order not only fails to provide Gulf Park recovery of the costs of the improvements made pursuant to the May 30, 1984 Order or any return on that investment, but also goes so far as to penalize Gulf Park for that investment. The MPSC, accordingly, has taken the use of Gulf Park's property without paying just compensation and so violated the Fifth Amendment.

CONCLUSION

This case presents this Court with the opportunity to redress conduct squarely in conflict with those fundamental notions of justice and fair play that are basic to our idea of ordered liberty. The MPSC has, through the

exercise of unreasonable, arbitrary or capricious regulatory power, deprived Gulf Park of a just and reasonable rate of return for its investment in putting private property to public use and has commandeered such private property for public use without affording Gulf Park just compensation. The Mississippi Supreme Court has upheld these actions. The jurisprudence from this Court, however, doubtless holds that such conduct runs roughshod over the constitutional protection afforded by the Fifth and Fourteenth Amendments to the United States Constitution to Gulf Park to be free from having its property confiscated or taken by state government without due process of law or just compensation.

WHEREFORE, PETITIONER RESPECTFULLY PRAYS that this Court grant this Petition for a Writ of Certiorari, vacate the decision of the Mississippi Supreme Court, and render a decision holding the March 24, 1994 Order of the Mississippi Public Service Commission violates Gulf Park Water Company, Inc.'s Fifth and/or Fourteenth Amendment constitutional rights and is, therefore, void.

Respectfully submitted:

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APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

NO. 96-CC-00333-SCT

GULF PARK WATER COMPANY, INC.

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-A

DATE OF JUDGMENT:	02/12/96
TRIAL JUDGE:	HON. WILLIAM H. MYERS
COURT FROM WHICH APPEALED:	JACKSON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	JOHN BRENMAN DONGIEUX
ATTORNEY FOR APPELLEE:	WILLIAM BRUCE MCKINLEY
NATURE OF THE CASE:	CIVIL – STATE BOARDS AND AGENCIES (OTHER THAN WORKERS' COMPENSATION)
DISPOSITION:	AFFIRMED – 9/11/97
MOTION FOR REHEARING FILED:	(Filed Sep. 11, 1997)
MANDATE ISSUED:	

BEFORE DAN LEE, C.J., McRAE AND SMITH, JJ.

DAN LEE, CHIEF JUSTICE, FOR THE COURT:

Gulf Park Water Company, Inc. ("Gulf Park"), a water utility under the jurisdiction of the Mississippi Public Service Commission ("Commission"), has appealed portions of an Order issued by the Commission on March 24, 1994, and subsequently affirmed by the Chancery Court

of Jackson County on February 12, 1996. The Commission's Order found Gulf Park in violation of the Order of May 30, 1984, mandating that Gulf Park make certain improvements in their water system. The March 1994 Order directed Gulf Park to immediately cease collecting $1.47 per month per customer which it had been collecting to defray costs required by the May 1984 Order. The March 1994 Order further directed Gulf Park to refund to its ratepayers the $1.47 per customer per month it had collected since the Commission's Order of May 30, 1984, through 1993 (approximately $126,958), plus interest.

Gulf Park is a privately owned public utility providing water and sewer service to approximately 1,200 homes within a particular certificated area in Jackson County, Mississippi, generally referred to as Gulf Park Estates. Gulf Park was acquired by Johnson Utility Company, Inc. in 1980. Both the water and sewer systems were in poor condition and/or non-functioning. In 1983, Gulf Park was directed by the Chancery Court of Jackson County to proceed with a rate filing before the Commission to obtain the necessary funds to correct the problems connected with the sewer system.

After a hearing before the Commission on May 30, 1984, an Order was rendered by the Commission. Gulf Park was ordered to install a 200 gallon-per-minute ("g.p.m.") well to its system within 45 days and allowed to collect an additional $1.47 per month per customer to fund this expenditure, which, when added to the $17.03 fixed monthly rate, totaled a flat $18.50 monthly rate for a

single family residence.[1] In response to this Order, Gulf Park placed on line two wells which had been previously abandoned and installed a 70 g.p.m. well at a new location. Johnson stated that the combination of these efforts increased Gulf Park's flow to well over that required by the State Board of Health.

On December 15, 1993, a hearing commenced in the Jackson County Courthouse before the Commission. During this hearing Gulf Park made a Motion to Amend the 1984 Order to make it speak true, asserting that it had met the spirit of the Order, if not the letter. In the hearing, Gulf Park admitted that it had not installed the 200 g.p.m. well directed by the 1984 Order.

On March 24, 1994, the Commission denied Gulf Park's Motion to Amend and found Gulf Park to be in violation of the May 30, 1984 Order. The Commission ordered Gulf Park to cease collecting the $1.47 per month per customer to fund the well requirement and further ordered Gulf Park to refund the amount collected since 1984, plus interest. Gulf Park appealed this decision initially to the Circuit Court of Hinds County, First Judicial District, pursuant to Mississippi Code Annotated § 77-1-45. The case was transferred to Jackson County Chancery Court on October 27, 1994. On February 12, 1996, the chancellor affirmed the Commission's Order of March 24, 1994. Gulf Park appeals from the chancellor's ruling.

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[1] Also, the monthly rate, inclusive of the additional $1.47, for apartment complexes was $18.50 per apartment and for commercial businesses and country clubs $28.50.

An order of the Commission is presumptively valid. ***Runkin Util. Co., Inc. v. Miss. Pub. Serv. Comm'n,*** 585 So. 2d 705, 709 (Miss. 1991); ***Miss. Pub. Serv. Comm'n v. South Central Bell,*** 464 So. 2d 1133, 1135 (Miss. 1984). The Commission, with its expertise, is the trier of fact and has the right to determine the weight of the evidence and the credibility of the witness. ***Pittman v. Miss. Pub. Serv. Comm'n,*** 538 So. 2d 387, 394 (Miss. 1989); ***South Central Bell,*** 464 So. 2d at 1135. This Court will set aside an order of the Commission only "if it is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the [Commission], or violates constitutional rights." Miss. Code Ann. § 77-3-67(4). An order of the Commission may not be set aside on appeal unless the Court finds that it contains errors of law, is contrary to the manifest weight of the evidence, or is not supported by substantial evidence. ***South Hinds County Water Co. v. Miss. Pub. Serv. Comm'n,*** 422 So. 2d 275, 281 (Miss. 1982).

On May 30, 1984, Gulf Park was ordered by the Commission to install a 200 g.p.m. well to alleviate the water pressure problems in its certificated area in Jackson County. The May 1984 Order also allowed Gulf Park to collect $1.47 per customer per month to recover the additional expenses involved in the installation of the well. In short, Gulf Park was ordered to install a 200 g.p.m. well and it did not do so, pursuing an alternative path to alleviate the water pressure problems in its system. Additionally, Gulf Park did not move to amend the May 1984

Order as being unreasonable or impossible, and continued to collect the additional $1.47 per month per customer to fund work not done. The foregoing is substantial evidence which supports the Commission's March 24, 1994 Order, which was subsequently affirmed by the chancellor, denying Gulf Park's Motion to Amend, finding Gulf Park in violation of the May 1984 Order, and directing the refund to the ratepayers of the monies collected pursuant to the May 1984 Order. The decision of the chancellor is, therefore, affirmed.

AFFIRMED.

PRATHER AND SULLIVAN, P.JJ., PITTMAN, BANKS, McRAE, ROBERTS, SMITH AND MILLS, JJ., CONCUR.

BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION

93-UA-0453	IN RE: AN INQUIRY INTO WHETHER GULF PARK WATER COMPANY, INC., HAS COMPLIED WITH PRIOR ORDER OF THIS COMMISSION AND OTHER RELATED MATTERS.
MISSISSIPPI PUBLIC SERVICE COMMISSION	

(Filed Jun. 8, 1994)

BE IT REMEMBERED that the Mississippi Public Service Commission met in Special Session on December 7, 1993, to hear an argument on a Motion to Continue. Vice Chairman Herbert presided.

BE IT REMEMBERED that the Mississippi Public Service Commission met in Special Session on December 15 and 16 1993, in the Chancery Courthouse of Jackson, County, Pascagoula, Mississippi. The following Commissioners were present:

Chairman Bo Robinson

Vice Chairman Curt Hebert, Jr.

Vice Chairman Hebert called the meetings to order and the Commission engaged in hearing the testimony and evidence in Cause No. 93-UA-0453, Mississippi Public Service Commission.

The Commission, having completed the hearing of Cause No. 93-US-0453, Mississippi Public Service Commission, and after having reviewed all testimony, exhibits, comments and evidence, entered its Order on March 24, 1994.

VOLUME III

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on behalf of the Mississippi
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Initial Findings

* * *

[p. 355] and I – to take a little time and confer and let's come back in at – I don't see any need for oral arguments. We've heard the entire case and I don't see any need for a summary. Let's come back at 3:30. We stand in recess until 3:30.

(A SHORT RECESS WAS HAD.)

BY VICE CHMN HEBERT: I'm going to read the initial findings that Chairman Robinson and I have put together. I also have copies so that you may have it, Mr. Allred and Mr. McKinley.

93-UA-453, Mississippi Public Service Commission, these are initial findings:

After further review of the record, there may be additional findings which shall be issued along with the Order. Any and all outstanding Motions that are before this Commission are hereby denied. After hearing the testimony and considering the evidence in this cause, the Mississippi Public Service Commission finds that it has jurisdiction of the parties and subject matter into this inquiry.

With regard to the 1984 Order, the Commission finds that Gulf Park has been and is in violation of the 1984 Order issued by the Commission in U-4481. Not only has Gulf Park failed to install the 200 gallon-per-minute water well as directed by the Commission Order, it has collected $1.47 per customer that was set [p. 356] out in the Order to pay for this well. The Commission finds collection of this money to be unconscionable and that

Gulf Park should immediately cease and desist of collecting the $1.47 and that immediate refund plus interest should be made by Gulf Park to the ratepayers with refunds to be mailed within 60 days of issuance of the Mississippi Public Service Commission Order.

The Commission is considering the willfulness of the conduct and appropriate fines and penalties as provided by law.

The Commission further finds Gulf Park to be in direct violation of the Order establishing docket and complaint in this cause by refusing to allow the accountant from the Public Utilities Staff to inspect the books and records of Gulf Park in anticipation of this hearing.

The Commission further finds Gulf Park Water Company has been and is in violation of Rule 9(G) of the Mississippi Public Service Commission's Rules and Regulations governing public utility service by not crediting or refunding customer deposits as required by said Rule.

Gulf Park is hereby ordered to allow Public Utilities Staff and/or Commission personnel immediate access to the books and records of Gulf Park so that the exact amount of the [p. 357] refunds to customers can be determined. In addition, all costs of the refunds and the amount of the fines are to be borne by Gulf Park and shall not be passed on to the ratepayer.

An Order will be issued reflecting these findings as soon as it can be determined the exact amount of the fines and refunds. Let this be warning to Gulf Park, and any other utility for that matter, that the Mississippi Public Service Commission takes its Orders very seriously and

they are to be complied with. Non-compliance with Commission Orders shall be dealt with appropriately and harshly, especially when those suffering from non-compliance are the ratepayers. The laws of the State of Mississippi and the Rules, Regulations and Orders of the Mississippi Public Service Commission are not flexible, nor is this body. We stand adjourned with an appropriate Order to follow.

(THE HEARING WAS ADJOURNED AT 3:55 P.M.)

* * *

BEFORE THE PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSISSIPPI

93-UA-0453

MISSISSIPPI PUBLIC
SERVICE COMMISSION

IN RE: AN INQUIRY INTO WHETHER GULF PARK WATER COMPANY, INC., HAS COMPLIED WITH PRIOR ORDER OF THIS COMMISSION AND OTHER RELATED MATTERS.

ORDER

This cause came on for hearing on the 15th day of December, 1993, concerning the inquiry into whether Gulf Park Water Company, Inc., ("Gulf Park") had complied with a prior order that this Commission issued in Docket U-4481 and entered on May 30, 1984, and other matters referenced herein. After a full hearing in this matter, and after considering the evidence, both oral and documentary, the Commission finds as follows, to-wit:

1. PROCEDURAL BACKGROUND

Gulf Park is a public utility as defined in Miss. Code Annotated 77-3-3(d)(4) Supp. 1993. Pursuant to Miss. Code Annotated 77-3-5 (1972), as amended, this Commission has exclusive original jurisdiction over the intrastate business and property of utilities. Additionally, the Commission has continuing jurisdiction to enforce its orders.

The Commission has jurisdiction of the parties and the subject matter. Due and proper notification of this Docket and hearing was provided as required under the

law and under the Rules and Regulations of this Commission.

On October 19, 1993, pursuant to authority granted by Miss. Code Annotated 77-3-1 et seq. (1972) and Miss. Code Ann. 77-1-53 (1972), as amended and pursuant to the Rules of Practice and Procedure which govern the Mississippi Public Service Commission ("Commission") established a Docket to conduct an inquiry into whether Gulf Park Water Company, Inc., had complied with a prior order of this Commission issued in Docket U-4481 and entered on May 30, 1984.

On November 1, 1993, Gulf Park filed a Response and Answer.

On December 7, 1993, a Motion to Continue was filed by Gulf Park.

On December 7, 1993, the Motion to Continue was denied by the Commission. Subsequently a hearing was held.

2. DISCUSSION AND FINDINGS

On May 30, 1984, the Commission issued an order in Docket U-4481, mandating that Gulf Park install a 200 GPM (gallons per minute) well in its certified area. Said well was ordered to be completed within forty-five days from May 30, 1984.

In Docket U-4481, the Commission approved an increase in monthly rates for furnishing of water service by Gulf Park in its certified area located in Jackson County, Mississippi. The Commission authorized an additional charge to each customer of $1.47 per month to

allow Gulf Park to recover expenses involved in installing the 200 GPM well.

Based upon testimony of witnesses from both sides, a 200 GPM well was never installed by Gulf Park as required by prior orders of this Commission.

Based upon a stipulation by Gulf Park, $1.47 has been collected per month per customer as authorized by the prior order.

Based upon testimony of its own witnesses, Gulf Park admits that it was in technical violation of the order and that the order can be changed only by the full Commission which was not done in this case.

The Commission finds that Gulf Park is in violation of the previous order issued in Docket U-4481 on May 30, 1984.

The Commission finds that serious concerns have been raised as to whether Gulf Park is charging reasonable connection fees.

Testimony revealed that Gulf Park had denied access to its books by Commission witnesses; therefore, there was a lack of evidence as to whether Gulf Park has been complying with Rule 9G of the Commission's Rules and Regulations Governing Public Utility Service.

IT IS, THEREFORE, ORDERED AND ADJUDGED that:

(1) Gulf Park immediately cease and desist to collecting $1.47 per month per customer.

(2) Gulf Park make a refund plus interest to the ratepayers of Gulf Park of the $1.47 previously collected,

with refunds to be mailed within sixty (60) days of issuance of this order.

(3) Gulf Park is hereby ordered to refund the amounts as shown in Exhibit "A" attached to this Order. In addition, all costs of the refunds and the amount of the fines will be borne by Gulf Park and shall not be passed on to the ratepayers.

(4) The Commission orders that Gulf Park meet with the Public Utilities Staff to determine compliance with Rule 9G of the Commission's Rules and Regulations Governing Public Utility Service.

(5) The Commission further orders that additional fines and penalties will be levied pursuant to Miss. Code Annotated 77-1-53 (1972) as amended, if the refund and interest is not mailed to the customer within sixty (60) days of issuance of this order.

This order shall be in full force and effect from and after the date of issuance.

Chairman Curt Hebert, Jr., votes Aye.

Commissioner Bo Robinson votes Aye.

SO ORDERED this the 24th day of March, 1994.

(Seal) MISSISSIPPI PUBLIC SERVICE COMMISSION

/s/ Curt Hebert, Jr.
Curt Hebert, Jr., Chairman

/s/ Bo Robinson
Bo Robinson, Commissioner

ATTEST: A True Copy

/s/ Brian U. Ray
Brian U. Ray
Executive Secretary

EXHIBIT "A"

YEAR	NO. OF CUSTOMERS	($1.47) ADDITIONAL REVENUE	TOTAL REVENUE	INTEREST 8% # PERIODS	GRAND TOTAL BY YEAR
1984	556	$ 8.82/Year	$ 4,903.92	2.1589	$ 10,587.07
1985	556	$17.64/Year	$ 9,807.84	1.9990	$ 19,605.87
1986	688	$17.64/Year	$12,136.32	1.8509	$ 22,463.11
1987	723	$17.64/Year	$12,753.72	1.7138	$ 21,857.33
1988	829	$17.64/Year	$14,623.56	1.5869	$ 23,206.13
1989	769	$17.64/Year	$13,565.16	1.4693	$ 19,931.29
1990	795	$17.64/Year	$14,023.80	1.3605	$ 19,079.38
1991	817	$17.64/Year	$14,411.88	1.2597	$ 18,154.65
1992	871	$17.64/Year	$15,364.44	1.1664	$ 17,921.08
1993	927	$17.64/Year	$16,352.28	1.08	$ 17,660.46
1994					$190,466.37
Jan	971	1.47/Mo	$ 1,427.37		
Feb	969	1.47/MO	$ 1,424.43		
Mar	968	1.47/MO	$ 1,422.96		
			$ 4,274.76		

Grand Total $194,741.13

IN THE CHANCERY COURT OF
JACKSON COUNTY, MISSISSIPPI

GULF PARK WATER COMPANY, INC.

APPELLANT

V. CAUSE NO. 94-2893

MISSISSIPPI PUBLIC SERVICE COMMISSION

APPELLEE

ORDER

(Filed Feb. 12, 1996)

This day this cause came before this Court in the above styled and numbered appeal from the Final Order of the Mississippi Public Service Commission dated the 24th day of March, 1994, issued in Mississippi Public Service Commission Docket 93-UA-0453, inquiring into whether Gulf Park Water Company, Inc., has complied with a prior Order of the Commission and other related matters. A copy of said Order is attached hereto and incorporated herein by reference as Exhibit "A" to this Order, and this Court having reviewed the record and evidence in this matter and having considered the briefs submitted to this Court, is of the opinion and finds as follows:

(1) This Court is of the opinion that the facts, matters and issues in this case have been adequately briefed by the parties and this Court does not feel oral argument would assist it in making its decision. Therefore, the request for oral argument heretofore made by the Appellant in this cause is hereby denied.

(2) The Order issued by the Mississippi Public Service Commission in this matter does not contain any errors of law, is supported by substantial evidence, is not contrary to the manifest weight of the evidence, is not in excess of statutory authority or jurisdiction of the Commission, and does not violate any constitutional rights, and should be affirmed.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Appellant's request for oral argument in this case is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Order issued by the Mississippi Public Service Commission on the 24th day of March 1994, in Docket No. 93-UA-0453, is hereby affirmed.

OR ORDERED AND ADJUDGED this the 12th day of February 1996.

/s/ William H. Myers
WILLIAM H. MYERS, CHANCELLOR

(Seal)

MANDATE
From The
SUPREME COURT OF MISSISSIPPI

To the Jackson County Chancery Court – GREETINGS:

On 11th Day of September, 1997, in proceedings held in the Courtroom, Carroll Gartin Justice Building, the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case #96-CC-00333-SCT
Trial Court Case #942893

Gulf Park Water Company, Inc.
vs.
Mississippi Public Service Commission

Affirmed. Appellant is taxed with all costs of this appeal.

MONDAY, DECEMBER 8, 1997:
DISPOSITION – Motion for Rehearing denied. Prather, P.J., and Banks, J., would grant.

YOUR ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Hon. Dan Lee, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court hereunto affixed, in the City of Jackson, on December 15, 1997, A.D.

/s/ Charlotte B. Williams
Supreme Court Clerk